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In the Supreme Court of the United States

STATE OF MICHIGAN, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

UTILITY AIR REGULATORY GROUP, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

NATIONAL MINING ASSOCIATION, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Environmental Protection Agency (EPA) reasonably construed 42 U.S.C. 7412 as directing it to consider costs when establishing the appropriate level of any regulation of hazardous air pollutant emissions from power plants, but not when deciding whether to regulate those plants in the first place.

2. Whether the EPA reasonably concluded that its decision to list power plants among the source categories to be regulated under 42 U.S.C. 7412(d) required it to promulgate emission standards for all listed hazardous air pollutants emitted by such plants.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-98a) is reported at 748 F.3d 1222.[1] The final rule promulgated by the Environmental Protection Agency (EPA) (excerpted at Pet. App. 196a-1160a) is published at 77 Fed. Reg. 9304.

JURISDICTION

The judgment of the court of appeals (Pet. App. 99a-100a) was entered on April 15, 2014. The three petitions for a writ of certiorari were filed on July 14, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves the EPA's determination that it was "appropriate and necessary" to regulate power-plant emissions under 42 U.S.C. 7412(n)(1)(A). The EPA declined to consider costs when making that determination, concluding that costs should instead be considered when setting the appropriate standards for hazardous air pollutant emissions from such plants under Section 7412(d). The court of appeals upheld the EPA's interpretation of the statute as "clearly permissible" under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). Pet. App. 25a.

1. a. In the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399, Congress established a list of more than 180 hazardous air pollutants. It directed the EPA to review and revise that list periodically to add other pollutants that present ad-

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[1] Citations to "Pet. App." are to the appendix to the petition for a writ of certiorari filed by the National Mining Association (NMA) in No. 14-49.

verse human health or environmental effects. 42 U.S.C. 7412(b).

Congress also directed the EPA to publish and occasionally revise "a list of all categories and subcategories of major sources" of the listed pollutants. 42 U.S.C. 7412(c)(1). A "major source" is any stationary source or group of stationary sources at a single location and under common control that emits or has the potential to emit 10 tons per year or more of any single hazardous air pollutant, or 25 tons per year or more of any combination of hazardous air pollutants. 42 U.S.C. 7412(a)(1). The statute also requires the EPA to list any category or subcategory of "area sources"—defined to include all stationary sources of hazardous air pollution that are not "major sources"—that the agency concludes "presents a threat of adverse effects to human health or the environment * * * warranting regulation under this section." 42 U.S.C. 7412(a)(2), (c)(1) and (3).

The listing of a source category that includes major sources triggers a statutory obligation for the EPA to promulgate emission standards for all listed hazardous air pollutants emitted by sources within that category. 42 U.S.C. 7412(d)(1). Those standards must "require the maximum degree of reduction in emissions of * * * hazardous air pollutants" that the EPA determines is achievable, taking into account factors such as cost, energy requirements, and non-air-quality health and environmental impacts. 42 U.S.C. 7412(d)(1) and (2). In general, for existing sources, the "maximum degree of reduction in emissions" must be at least as stringent as the average emission limitation achieved by the best-performing 12% of existing sources. 42 U.S.C.

7412(d)(3)(A); see 42 U.S.C. 7412(d)(3)(B) (requiring the EPA to set standards that are at least as stringent as the average emission limitations of the five best performers for source categories including fewer than 30 sources). The EPA refers to the minimum stringency standards as "floor" standards, and to more stringent standards as "beyond-the-floor" standards. See 77 Fed. Reg. at 9307. After the enactment of the Clean Air Act Amendments of 1990, the EPA promulgated Section 7412 emission standards for scores of source categories, covering the full range of industries in the United States. See 40 C.F.R. Pt. 63.

Section 7412 authorizes the EPA to delete particular source categories from the list, but only in narrowly defined circumstances. Such delisting is permissible if the agency determines that emissions from no source in the category (1) are likely to cause a lifetime risk of cancer greater than one in a million to the individual in the population who is most exposed to those emissions, or (2) "exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any source." 42 U.S.C. 7412(c)(9)(B)(i) and (ii). Section 7412 does not authorize the EPA to delete sources from the list based on the agency's view that the costs associated with regulating hazardous air pollutant emissions from that source exceed the benefits of doing so or are otherwise too high.

b. This case involves one source category of air pollutants—coal- and oil-fired "electric utility steam generating units," *i.e.*, power plants. See 42 U.S.C. 7412(a)(8). The Clean Air Act Amendments of 1990

impose a separate listing requirement that must be satisfied before such plants may be regulated under the provisions set forth above. See 42 U.S.C. 7412(n)(1)(A). Congress required the EPA to perform, within three years of the 1990 amendments to the Clean Air Act, "a study of the hazards to public health reasonably anticipated to occur as a result of emissions" of listed hazardous air pollutants from power plants, "after imposition of the requirements" of the Clean Air Act. *Ibid.* Section 7412(n)(1)(A) further provides that the EPA "shall regulate [power plants] under [Section 7412] if [it] finds such regulation is appropriate and necessary after considering the results of the study." *Ibid.*[2]

2. a. In December 2000, after completing the study of power-plant emissions required by Section 7412(n)(1)(A), the EPA determined that regulation of coal- and oil-fired power plants under Section 7412 was "appropriate and necessary." 65 Fed. Reg. 79,823, 79,825 (Dec. 20, 2000). Based on that finding, the EPA added coal- and oil-fired power plants to the list of source categories to be regulated under Section 7412. *Id.* at 79,831.

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[2] Section 7412(n)(1) also required two additional studies relating to power plants: (1) an EPA study of the "health and environmental effects" of mercury emissions from power plants and other sources, and of the "technologies which are available to control [mercury] emissions, and the costs of such technologies," to be completed within four years, 42 U.S.C. 7412(n)(1)(B); and (2) a National Institute of Environmental Health Sciences study to determine the threshold level of mercury exposure below which adverse human health effects are not expected to occur, including for "sensitive populations," to be completed within three years, 42 U.S.C. 7412(n)(1)(C).

As part of its 2000 finding, the EPA determined that power plants are the largest source of domestic anthropogenic mercury emissions and that "[m]ercury is highly toxic, persistent, and bioaccumulates in food chains." 65 Fed. Reg. at 79,827. The EPA found that mercury emitted by power plants falls into bodies of water and then becomes concentrated in the bodies of predatory fish, which absorb the methylmercury contained by their food sources. When humans eat these contaminated fish, they too are exposed. *Ibid.* The methylmercury from the fish poses especially great risk to children born to women who were exposed to relatively high levels of methylmercury during pregnancy. *Ibid.* The EPA explained that methylmercury "readily passes * * * to the fetus and fetal brain," and that children exposed to methylmercury during pregnancy have exhibited developmental neurological abnormalities and delays. *Id.* at 79,829. The agency further estimated that approximately seven percent of American women of childbearing age—millions of women, in other words—were being exposed to methylmercury in amounts that exceed a health-protective level. *Ibid.*

Although the EPA's 2000 finding focused primarily on the hazards posed by mercury emissions, the agency also found that the cancer-related risks posed by several other metals emitted by power plants presented a potential public health concern, and that acid gas and dioxin emissions likewise warranted further evaluation. 65 Fed. Reg. at 79,827. The EPA also identified a number of available emission controls that are effective at reducing power-plant mercury and other hazardous air pollutant emissions and reducing public health risks. *Id.* at 79,830.

b. In 2005, the EPA attempted to reverse the 2000 determination and to remove power plants from the Section 7412(c) list. 70 Fed. Reg. 15,994 (Mar. 29, 2005) (2005 Delisting Rule). At that time, the EPA concluded that it was instead appropriate to regulate power-plant mercury emissions through an alternative statutory authority, 42 U.S.C. 7411.[3] The EPA promulgated Section 7411 standards of performance for mercury emissions in a related rulemaking. 70 Fed. Reg. 28,606 (May 18, 2005).

Numerous parties petitioned for judicial review of the 2005 Delisting Rule and the accompanying Section 7411 mercury emission standards. The D.C. Circuit granted the petitions and vacated both rules. *New Jersey* v. *EPA*, 517 F.3d 574 (2008). The court held that the 2005 Delisting Rule "violated the [Act's] plain text" by failing to comply with the delisting requirements set forth in 42 U.S.C. 7412(c)(9). 517 F.3d at 581-583. The government filed, but later moved to dismiss, a petition for a writ of certiorari seeking review of the D.C. Circuit's decision. See *EPA* v. *New Jersey*, 555 U.S. 1162 (2009) (No. 08-512) (petition filed Oct. 17, 2008; motion to dismiss filed Feb. 6, 2009). This Court dismissed the government's petition under Sup. Ct. Rule 46, see *ibid.*, and it denied an industry group's petition for a writ of certiorari, *Utility Air Regulatory Grp.* v. *New Jersey*, 555 U.S. 1169 (2009) (No. 08-352).

3. As a result of the D.C. Circuit's ruling in *New Jersey*, power plants remained on the Section 7412(c)

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[3] Section 7411 authorizes the EPA to establish "standards of performance" for sources of air pollution, but that authority does not extend to hazardous air pollutants that are listed and regulated under Section 7412. 42 U.S.C. 7411(d)(1).

list pursuant to the EPA's 2000 listing decision. The agency therefore was subject to a nondiscretionary duty to promulgate Section 7412(d) emission standards for all hazardous air pollutants emitted by power plants. See 42 U.S.C. 7412(c)(5) and (e) (requiring the EPA to promulgate emission standards for hazardous air pollutants emitted by listed source categories no later than November 15, 1990, or within two years of listing, whichever is later).

The EPA subsequently solicited public comments on a proposed rule implementing that statutory command. See 76 Fed. Reg. 24,976 (May 3, 2011) (2011 Proposed Rule). As part of the proposed rule, the EPA clarified its interpretation of Section 7412(n)(1)(A)'s directive to regulate power plants "if [the EPA] finds such regulation is appropriate and necessary." See *id.* at 24,986-24,993.

The agency began by noting that Section 7412(n)(1)(A) itself "provides no clear standard to govern EPA's analysis," and that the broad phrase "appropriate and necessary" therefore "convey[s] considerable discretion to the [EPA] in determining what is appropriate and necessary in a given context." 76 Fed. Reg. at 24,987. The agency explained that regulation of power plants under Section 7412(n)(1)(A) is "appropriate" if (1) hazardous air pollutant emissions from those plants pose a hazard to either public health or the environment and (2) controls are available to reduce such emissions. *Id.* at 24,988-24,989. The EPA also stated that the best interpretation of the term "appropriate" is that it does "not allow for the consideration of costs in determining whether hazards to public health or the environment are reasonably anticipated to occur based on [power plant]

emissions." *Id.* at 24,989. The EPA further explained that nothing in Section 7412(n)(1)(A) requires the agency to consider costs as part of the source-category listing decision. The EPA also noted that Congress had not allowed the agency to consider costs when listing other source categories for regulation or when evaluating whether any source should be delisted. *Ibid.*

The EPA further explained that it may find regulation to be "appropriate" based "on a finding that any single [hazardous air pollutant] emitted from [power plants] poses a hazard to public health or the environment." 76 Fed. Reg. at 24,988. It noted that Section 7412 does not mandate separate "appropriate and necessary" findings for each individual pollutant, and that Section 7412 requires the EPA to promulgate standards for all hazardous air pollutants emitted by all of the other listed source categories subject to regulation. *Id.* at 24,989 (citing *National Lime Ass'n* v. *EPA*, 233 F.3d 625, 633 (D.C. Cir. 2000)). The EPA also explained that regulation of power plants is "necessary" under Section 7412(n)(1)(A) if public health or environmental hazards posed by power-plant emissions will not be addressed through the implementation of other Clean Air Act requirements. *Id.* at 24,990-24,992.

Finally, the EPA reaffirmed its initial December 2000 "appropriate and necessary" finding and listing decision, and it cited additional new robust technical analyses concerning the health and environmental hazards posed by power-plant hazardous air pollutant emissions. 76 Fed. Reg. at 24,986, 24,993-25,020. Those new analyses included, *inter alia*, a national-scale mercury risk assessment and a set of 16 case

studies of inhalation risks associated with non-mercury pollutants. *Id.* at 25,007-25,012. The EPA also noted its finding that power plants are responsible for approximately 50% of anthropogenic domestic mercury emissions, 82% of hydrogen chloride (an acid gas) emissions, 62% of hydrogen fluoride (another acid gas) emissions, 83% of selenium emissions, 62% of arsenic emissions, and significant quantities of several other hazardous air pollutant emissions. *Id.* at 25,002, 25,005-25,006.

4. In February 2012, the EPA issued a final rule promulgating emission standards for power plants. 77 Fed. Reg. 9304 (Feb. 16, 2012) (2012 Final Rule). The preamble to the rule addressed comments on the agency's interpretation of Section 7412(n)(1)(A)'s "appropriate and necessary" standard. The preamble explained that costs do "not have to be read into the definition of 'appropriate,'" and that "it is reasonable to assess whether to list [power plants] * * * without considering costs." *Id.* at 9326-9327.[4] EPA also reaffirmed its initial December 2000 "appropriate and necessary" finding and listing decision, as well as the additional analyses of the health and environmental hazards posed by power-plant hazardous air pollutant emissions that the agency had discussed in the 2011 Proposed Rule. *Id.* at 9310-9364.

In promulgating the 2012 Final Rule, the EPA ultimately concluded that it was "appropriate" to regu-

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[4] See also 1 *EPA's Responses to Public Comments on EPA's* National Emissions Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units 29 (Dec. 2011) (*EPA Responses to Comments*), http://www.epa.gov/ttn/atw/utility/mats_rtc_chapters_foreword-1-2-3-4_121611.pdf (last visited Oct. 13, 2014).

late coal- and oil-fired power plants under Section 7412 because, *inter alia*: (1) such plants remain by far the largest domestic source of mercury as well as of many other listed hazardous air pollutants; (2) mercury and other emitted pollutants (including non-mercury metals and acid gases) pose hazards to public health and the environment; and (3) effective controls remain available to reduce emissions. 77 Fed. Reg. at 9362-9363, 9366 (noting that various findings provided independent bases for regulation). The agency separately reaffirmed that it was "necessary" to regulate power-plant hazardous air pollutant emissions for various reasons, including the EPA's conclusion that the identified hazards to public health will not be addressed through the implementation of other Clean Air Act requirements pertaining to power plants. *Id.* at 9363.[5]

Applying the methodology prescribed by Congress in Section 7412(d), the EPA then promulgated emission standards for listed hazardous pollutants emitted by power plants. 77 Fed. Reg. at 9366-9376. The EPA explained that those standards can be met with proven and available technologies. *Ibid.*; see *id.* at 9307. The agency also noted that the standards would dramatically reduce power-plant emissions of mercury and other hazardous air pollutants and would result in extraordinary public health benefits. *Id.* at 9306.

In promulgating the 2012 Final Rule, the EPA also issued a Regulatory Impact Analysis (RIA) estimating the costs and benefits of the new power-plant emission

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[5] The 2012 Final Rule also denied an administrative petition requesting that the EPA delist coal-fired power plants under Section 7412(c)(9). 77 Fed. Reg. at 9364-9366 (concluding that neither of Section 7412(c)(9)(B)'s conditions had been satisfied).

standards pursuant to Executive Order No. 13,563, 3 C.F.R. 215 (2012). 77 Fed. Reg. at 9305-9306, 9426-9432. That analysis projected that the standards, once fully implemented in 2016, would yield total annual monetized benefits of between $37 billion and $90 billion (measured in 2007 dollars), as compared to annual costs of $9.6 billion. *Id.* at 9305-9306. Those quantifiable benefits include the prevention of up to 11,000 premature deaths each year and the prevention of IQ loss to children whose mothers consume non-commercial freshwater fish caught by recreational anglers in modeled watersheds during pregnancy. *Id.* at 9306, 9366, 9427-9428, 9445.[6]

The EPA made clear, however, that the RIA played no role in its finding that regulating power plants was "appropriate and necessary" under Section 7412(n)(1)(A). See 77 Fed. Reg. at 9323. It also emphasized that many of the direct health and environmental benefits from reducing emissions from hazardous air pollutants cannot be fully quantified. *Id.* at 9306, 9323, 9426-9432. For example, the EPA noted that it could not measure the benefits that would flow from (1) reducing adverse effects on brain development and memory functions (apart from the IQ loss

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[6] The EPA explained that the rule would reduce emissions of mercury and other listed hazardous air pollutants, and that the technology necessary to reduce those emissions would also reduce emissions of particulate matter (specifically $PM_{2.5}$) and sulfur dioxide (a precursor to $PM_{2.5}$), which are not listed hazardous air pollutants but are regulated surrogates under the final rule. 77 Fed. Reg. at 9305. The agency further explained that the "great majority" of the quantifiable benefits are "attributable to co-benefits from reductions in $PM_{2.5}$-related mortality." *Ibid.* The EPA emphasized, however, that those co-benefits did not form the basis of its "appropriate and necessary" finding. *Id.* at 9323.

noted above); (2) reducing IQ loss in children whose mothers consume commercial or saltwater fish during pregnancy; (3) reducing IQ loss in children exposed to pollutants after birth; and (4) other health and environmental benefits associated with reductions to the incidence of cancer and of acidification of water bodies. *Ibid*; see U.S. EPA, *Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards* 4-71, http://www.epa.gov/mats/actions.html (last visited Oct. 9, 2014) (explaining obstacles to quantifying benefits in greater detail). The EPA ultimately concluded that, "[u]pon considering these limitations and uncertainties, it remains clear that the benefits of this rule * * * are substantial and far outweigh the costs." 77 Fed. Reg. at 9306.

4. Petitioners—including several States and various industry groups—filed consolidated petitions for judicial review of the 2012 Final Rule in the D.C. Circuit. Other power producers and other States intervened in support of the final rule. As relevant here, petitioners challenged the EPA's interpretation and application of Section 7412(n)(1)(A)'s "appropriate and necessary" requirement, arguing that it was unreasonable for the agency (1) to decline to consider the costs of regulation when deciding whether to list power plants, and (2) to regulate all hazardous air pollutants emitted by power plants without making separate and independent "appropriate and necessary" determinations for each one. Petitioner also challenged numerous other aspects of the 2012 Final Rule, including the EPA's factual findings with respect to the harmful effects of exposure to mercury and other pollutants.

a. The court of appeals upheld the EPA's "appropriate and necessary" finding and listing of power plants. Pet. App. 18a-43a. Applying the familiar two-part test set forth in *Chevron*, 467 U.S. at 842-843, the court first concluded that the statute "does not evince unambiguous congressional intent on the specific issue of whether EPA was required to consider costs in making its 'appropriate and necessary' determination under [Section 4212(n)(1)(A)]." Pet. App. 25a. It then upheld the EPA's interpretation as "clearly permissible," stating that the agency had "reasonably concluded it need not consider costs in making its 'appropriate and necessary' determination under [Section 7412(n)(1)(A)]." *Id.* at 25a, 33a. The court of appeals relied in part on *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457 (2001), in which this Court highlighted its longstanding "refus[al] to find implicit in ambiguous sections of the [Clean Air Act] an authorization to consider costs that has elsewhere, and so often, been expressly granted." *Id.* at 467; see Pet. App. 25a-26a; see also *id.* at 31a n.2 (citing other cases in which this Court has refused to require agencies to consider costs when making regulatory decisions). The court of appeals also noted that Congress (1) has required regulation of other sources of pollution without consideration of cost; (2) has not permitted the EPA to consider costs when deciding whether to delist a source category; and (3) has authorized the EPA to take account of costs when setting the *level* of regulation of power-plant emissions. *Id.* at 27a-29a, 31a; see also 42 U.S.C. 7412(c) and (d)(2).

The court of appeals unanimously rejected petitioners' argument that Section 7412(n)(1)(A) requires the EPA to make a separate "appropriate and neces-

sary" determination for each of the nearly 200 listed hazardous air pollutants. Pet. App. 38a-40a. The court therefore upheld the agency's decision to treat power plants like other listed major pollution sources, as to which the EPA must promulgate emissions standards for all pollutants. *Id.* at 39a. In doing so, the court rejected "[t]he notion that EPA must 'pick and choose' among [such pollutants] in order to regulate only those substances it deems most harmful." *Ibid.* (citing *National Lime Ass'n*, 233 F.3d at 633-634, and *New Jersey*, 517 F.3d at 582).

The court of appeals unanimously rejected all other aspects of petitioners' challenges to the 2012 Final Rule. Pet. App. 16a-22a, 33a-38a, 40a-54a. Most notably, it concluded that "EPA's 'appropriate and necessary' determination in 2000, and its reaffirmation of that determination in 2012, are amply supported by EPA's findings regarding the health effects of mercury exposure." *Id.* at 40a-41a.

b. Judge Kavanaugh concurred in part and dissented in part. Pet. App. 68a-98a. Judge Kavanaugh joined all aspects of the panel's *per curiam* opinion, except that he agreed with petitioners that the EPA must consider the costs associated with regulating power plants in order to determine whether such regulation is "appropriate" under Section 7412(n)(1)(A).

ARGUMENT

The court of appeals correctly upheld the EPA's interpretation of Section 7412 and its determination that regulation of power plants is "appropriate and necessary." Three sets of petitioners now challenge that court's conclusion that the agency's construction of the statute was "clearly permissible" under *Chevron*

U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984). Pet. App. 25a. That challenge lacks merit.

The EPA reasonably construed Section 7412 as directing it to consider compliance costs when establishing the appropriate *level* of any power-plant regulation, but not when deciding whether to regulate those plants under Section 7412 at all. The EPA also reasonably determined that, because it is "appropriate and necessary" to regulate power plants generally, the agency was required to establish emissions standards for *all* listed hazardous air pollutants. Petitioners cannot show that the decision below misapplies *Chevron* or conflicts with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The court of appeals correctly applied *Chevron* and concluded that the EPA had reasonably declined to consider costs when deciding whether it was "appropriate and necessary" to regulate power-plant emissions under Section 7412(n)(1)(A). There is no merit to petitioners' argument that the statute unambiguously requires the agency to consider costs when making that determination.

a. The Clean Air Act requires the EPA to study the health effects of power-plant emissions and to regulate power plants if it "finds such regulation is *appropriate and necessary* after considering the results of the study." 42 U.S.C. 7412(n)(1)(A) (emphasis added). The statute does not define the broad terms "appropriate" and "necessary," nor does it otherwise explicitly address whether costs are a valid consideration for the EPA to take into account when deciding whether to list power plants for regulation under Section 7412. This Court has made clear that statuto-

ry silence with respect to costs will sometimes—but not always—prohibit the agency from taking costs into account when deciding whether or how to make a regulatory determination.[7]

In these circumstances, the court of appeals correctly held, under *Chevron* Step One, that Section 7412(n)(1)(A) does not unambiguously speak to whether the EPA must consider costs when deciding whether to regulate power plants. Pet. App. 25a. The court therefore correctly concluded that the EPA's interpretation must be upheld, under *Chevron* Step Two, if it "is based on a permissible construction of the statute." 467 U.S. at 843; see Pet. App. 18a, 25a, 32a-33a.

b. The court of appeals correctly upheld the EPA's interpretation of Section 7412(n)(1)(A) at *Chevron* Step Two. Section 7412 requires the agency to make two basic determinations when regulating the sources of hazardous air pollutants. First, the agency must decide whether any particular source category should appear on the list of source categories subject to regulation. See 42 U.S.C. 7412(c). Second, the EPA must promulgate specific emissions standards for any cate-

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[7] See, *e.g.*, *EPA* v. *EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1603, 1606-1607 (2014) (authorizing the EPA to consider costs when allocating emission contributions among upwind States under 42 U.S.C. 7410(a)(2)(D)(i)); *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 223 (2009) ("[S]ometimes statutory silence, when viewed in context, is best interpreted as limiting agency discretion."); *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 467 (2001) (prohibiting the EPA from considering costs when setting national ambient air quality standards); *American Textile Mfrs. Inst., Inc.* v. *Donovan*, 452 U.S. 490, 510-512 (1981) (holding that the Department of Labor was not required to engage in cost-benefit analysis when setting health and safety standards in absence of statutory command).

gories appearing on that list. See 42 U.S.C. 7412(d). The EPA reasonably concluded that, with respect to power plants as with respect to all other sources of pollution, the costs of regulation are relevant only to the second determination.

i. Section 7412(c) generally deprives the EPA of any discretion to consider costs when deciding whether to include a source category on the list of those subject to regulation. That provision requires the agency to list and regulate (1) all "major" sources of pollution, defined as those sources emitting more than 10 tons of a single hazardous air pollutant (or 25 tons of any combination of such pollutants) per year, 42 U.S.C. 7412(a)(1), and (2) any "area" sources of pollution that the EPA determines are dangerous "to human health or the environment." 42 U.S.C. 7412(c)(1), (2) and (3). Those statutory directives are mandatory and do not authorize the EPA to consider the compliance costs associated with regulating either type of source when making the initial listing decision.[8]

Section 7412(c)(9) authorizes the EPA to *delete* any major or area source category from the list in certain specified circumstances. As with the provisions establishing the general criteria the EPA must use when listing such categories, Section 7412(c)(9) does not authorize the agency to consider costs when making such deletions. Rather, the EPA is authorized to

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[8] See 42 U.S.C. 7412(c)(1) (declaring that the EPA "shall publish * * * a list of all categories and subcategories of major sources); 42 U.S.C. 7412(c)(3) (declaring that the EPA "shall list * * * each category or subcategory of area sources which [the EPA] finds presents a threat of adverse effects to human health or the environment * * * warranting regulation under this section").

delete a category from the list in two limited situations.

First, the EPA may delete a source category if (1) the "sole reason" for initially including the category on the list was its emission of a "unique chemical substance," and (2) that substance is subsequently deleted from the separate list of hazardous air pollutants because the EPA concludes that it will not cause adverse effects to human "health" or the "environment[]." 42 U.S.C. 7412(c)(9)(A) (cross-referencing 42 U.S.C. 7412(b)(3)(C) and (D)).

Second, the EPA may delete a source category if two other conditions are both satisfied. To the extent that sources within the category emit pollutants that may cause cancer in humans, the EPA must determine that "no source in the category (or group of sources in the case of area sources) emits such hazardous air pollutants in quantities which may cause a lifetime risk of cancer greater than one in a million to the individual in the population who is most exposed to emissions of such pollutants." 42 U.S.C. 7412(c)(9)(B)(i). In addition, to the extent that sources within the category emit pollutants that result in adverse health effects other than cancer, or in adverse environmental effects, the EPA must determine that "emissions from no source in the category or subcategory (or group of sources in the case of area sources) exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from [such] emissions." 42 U.S.C. 7412(c)(9)(B)(ii).

Although Section 7412(c) does not call for the EPA to consider costs when deciding whether to list or delist source categories, the statute does require the

agency to consider costs when deciding whether to set the proper *level* of permissible emissions beyond the minimum level required by Section 7412(d)(3). Thus, Section 7412(d)(2) states that the EPA must promulgate emission standards that

> require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section (including a prohibition on such emissions, where achievable) that the [EPA], *taking into consideration the cost of achieving such emission reduction*, and any non-air quality health and environmental impacts and energy requirements, determines is achievable for new or existing sources.

42 U.S.C. 7412(d)(2) (emphasis added).

ii. Congress instructed the EPA to regulate power plants if the agency concludes that such regulation is "appropriate and necessary" after considering a study of the health dangers posed by power-plant emissions after imposition of the other requirements of the Clean Air Act Amendments of 1990. 42 U.S.C. 7412(n)(1)(A). In light of the broader statutory scheme discussed above, the EPA interpreted that "appropriate and necessary" standard not to require any consideration of costs when making the initial decision whether to include power plants on the list of source categories subject to regulation.

The EPA's decision was reasonable, and the court of appeals correctly upheld it at *Chevron* Step Two. As explained above, Congress made cost irrelevant to the initial listing decision for other source categories, and nothing about Section 7412(n)(1)(A) requires a different result with respect to power plants. Although Congress gave the EPA broad discretion to decide whether regulation of power plants is "appro-

priate and necessary," the agency in making that determination reasonably looked to the process that Congress had established for listing other source categories.

In determining the range of factors bearing on the initial listing decision, the EPA also reasonably considered the criteria that Congress had established for *deleting* source categories from the list. After all, those criteria govern the deletion of "*any* source category"—including power plants—from those subject to regulation. 42 U.S.C. 7412(c)(9)(B) (emphasis added). The EPA appropriately concluded that Congress would not have intended it to consider a factor when initially listing power plants that it could not subsequently consider when deciding whether to delist such plants. Petitioners' contrary interpretation would produce a strange and asymmetric scheme, under which the EPA could consider expected costs at the outset in deciding whether power plants should be placed on the list, but could not revisit an initial listing decision if the costs of regulation turned out to be higher than anticipated. The EPA reasonably determined that the same sorts of considerations should govern both the listing and delisting of power plants under Section 7412(c)(9) and (n)(1)(A).

To be sure, Congress required the EPA to follow a separate procedure—unlike the one generally applicable to other hazardous air pollution sources—when deciding whether to include power plants on the list of sources subject to regulation. But Congress's decision to require the EPA to make the "appropriate and necessary" determination after considering a study of the effects of power-plant hazardous air pollutant emissions on public health does not imply that it also

wanted the EPA to consider costs when deciding whether to regulate such plants. If anything, it suggests the opposite, since the study mandated by Section 7412(n)(1)(A)—unlike the studies required by other provisions of Section 7412—does not itself require the EPA to consider the costs of regulation in any way.[9]

iii. As the court of appeals correctly explained, this Court's analysis in *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457 (2001), supports the EPA's decision not to consider costs in determining whether to list power plants under Section 7412(n)(1)(A). See Pet. App. 25a. The Court in *Whitman* held that the EPA is prohibited from considering implementation costs when setting national ambient air quality standards (NAAQS) under 42 U.S.C. 7409(b). 531 U.S. at 464-471. In reaching that conclusion, the Court noted that Congress had expressly required or permitted

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[9] See 42 U.S.C. 7412(n)(1)(A) (identifying focus of study as "the hazards to public health reasonably anticipated to occur as a result of emissions by [power plants] of pollutants listed under [Section 7412(b)] after imposition of the requirements of this chapter"); see also 42 U.S.C. 7412(f)(1)(B) (requiring the EPA to report to Congress on "the public health significance of [the risks of pollution even after implementation of the Clean Air Act Amendments of 1990] and the technologically and commercially available methods *and costs* of reducing such risks") (emphasis added), (n)(1)(B) (requiring the EPA to conduct a study of mercury emissions from power plants and other sources and to "consider the rate and mass of such emissions, technologies which are available to control such emissions, *and the costs of such technologies*") (emphasis added) and (s)(2) (requiring the EPA to report to Congress "information with respect to compliance with [emissions standards established under Section 7412] *including the costs of compliance experienced by sources in various categories and subcategories*") (emphasis added).

the agency to consider costs when making various other decisions relating to its regulation of air quality, and it highlighted its own prior "refus[al] to find implicit in ambiguous sections of the [Clean Air Act] an authorization to consider costs that has elsewhere, and so often, been expressly granted." *Id.* at 467 (citing *General Motors Corp.* v. *United States*, 496 U.S. 530, 538 (1990) and *Union Elec. Co.* v. *EPA*, 427 U.S. 246, 257 & n.5 (1976)).

Here, as with the NAAQS at issue in *Whitman*, Congress directed the EPA to consider regulatory costs when taking various specified actions under Section 7412, but it did not mention costs when establishing the "appropriate and necessary" standard.[10] The EPA reasonably concluded that, if Congress had intended to require the agency to consider costs in this specific context, it would have enacted an explicit statutory directive to that effect. See 2011 Proposed Rule, 76 Fed. Reg. at 24,989.

c. Petitioners' primary criticism of the EPA's decision not to consider costs under Section 7412(n)(1)(A) rests on their assertions that (1) the statutory term "appropriate" is facially broad and does not itself preclude consideration of costs, and (2) it is generally reasonable for agencies to consider costs when making regulatory decisions. See, *e.g.*, 14-46 Pet. 16-18; 14-47 Pet. 23-24; 14-49 Pet. 17-19; see also Pet. App. 73a-77a

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[10] See, *e.g.*, 42 U.S.C. 7412(d)(2) (setting level of emission standards generally), (d)(8)(A)(i) (same with respect to coke oven batteries), (f)(1)(B) (report to Congress on need for further legislation on air pollution), (f)(2)(A) (establishing additional emission standards), (n)(1)(B) (study of mercury emissions), (s)(2) (report to Congress on compliance with EPA standards under Clean Air Act).

(Kavanaugh, J. dissenting) (making same points). But even assuming those propositions are correct as a general matter, Congress may instruct the EPA as to whether and how to consider costs in any particular circumstance. See *Whitman*, 531 U.S. at 466.

Here, Congress (1) prohibited the EPA from considering costs when deciding whether to list source categories other than power plants; (2) prohibited the EPA from delisting any source category—including power plants—based on its assessment of costs; and (3) directed EPA to consider costs with respect to *other* specified actions under Section 7412. See pp. 17-23, *supra*. In this context, the agency reasonably concluded that Congress did not intend to require consideration of costs as part of the determination whether to regulate power plants under Section 7412(n)(1)(A).

It also bears emphasis that, pursuant to Congress's express directive, the EPA *did* consider costs when setting the actual emission standards for power plants under 42 U.S.C. 7412(d). Section 7412(d)(2) directs that such emission standards "require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section * * * that the [EPA], taking into consideration the *cost* of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable." 42 U.S.C. 7412(d)(2) (emphasis added). Congress further specified that "[t]he maximum degree of reduction in emissions that is deemed achievable * * * shall not be less stringent" than certain minimum levels of control that have already been achieved by similar sources in the same category or subcategory. 42 U.S.C. 7412(d)(3). Those

minimum standards themselves indirectly reflect the costs of regulation, insofar as they turn on the emission standards that have already been achieved by comparable sources of pollution, presumably in a cost-effective manner. See Pet. App. 27a, 30a.

Thus, far from requiring the EPA to ignore costs entirely when regulating power plants, Congress instead channeled cost considerations into the second stage of the process, at which the agency determines the extent of such regulation. See 42 U.S.C. 7412(d)(2). EPA's interpretation of Section 7412 to treat costs as a relevant factor only at this latter stage was both appropriate and consistent with petitioners' observation that Congress is typically sensitive to costs when imposing new regulations.[11]

d. The state petitioners also argue that the EPA's interpretation of Section 7412(n)(1)(A)'s term "appropriate," under which sources within a particular category may be regulated whenever the agency identifies a threat to public health or the environment, fails to give that term any independent meaning. 14-46 Pet. 13-15. Petitioners observe that the agency is required to make its "appropriate and necessary" determination *after* considering the results of a required study of the hazards to public health posed by power-plant pollution. *Id.* at 14. Petitioners assert that this se-

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[11] Petitioners in No. 14-49 argue that the Section 7412(n)(1)(A) study requires the EPA to consider costs insofar as the statute directs the agency to address "alternative control strategies for emissions which may warrant regulation." 14-49 Pet. 19. That is not correct. Section 7412(n)(1)(A) does not require the study to consider the costs of alternative control strategies, but merely to describe available and effective control technologies. See 1 *EPA Responses to Comments* 40.

quencing requires the EPA to "exercise its judgment and consider various factors, including costs," above and beyond the health hazards identified by the study. *Ibid.*

That argument fails for at least two independent reasons. First, as the court of appeals explained, the EPA "did *not* focus exclusively on health hazards in considering whether regulation would be 'appropriate,'" but also considered "'the availability of controls to address [hazardous air pollutant] emissions from [power plants].'" Pet. App. 28a (quoting 2011 Proposed Rule, 76 Fed. Reg. at 24,989, and citing 2012 Final Rule, 77 Fed. Reg. at 9311). Petitioners are therefore incorrect in asserting that the agency found regulation of power-plant emissions to be "appropriate" based solely on the study of health hazards required by Section 7412(n)(1)(A).

Second, as the court of appeals also recognized, the EPA's interpretation of the statute still required the agency "to apply its judgment in evaluating the results of the [Section 7412(n)(1)(A)] study." Pet. App. 28a. At the time Congress required that study, it was unclear whether the EPA would ultimately conclude that power-plant emissions can reasonably be anticipated to cause hazards to public health. Indeed, petitioners themselves disputed below that any such hazards exist. See *id.* at 40a-42a, 48a. The EPA therefore correctly interpreted Section 7412(n)(1)(A) to require it to evaluate the study's particular findings and then determine whether regulation was appropriate.[12]

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[12] The state petitioners are also incorrect in implying (14-46 Pet. 15) that the EPA failed to evaluate the "severity" of health effects as part of its hazard analysis. In fact, the EPA did consider the

e. Petitioners rely heavily on the regulatory impact analysis prepared by EPA. They assert that the agency itself believes that the costs associated with regulation of power-plant emissions "outweigh benefits by almost two thousand to one." 14-49 Pet. i; see *id.* at 2 (asserting that "EPA projected that these regulations will inflict $9.6 *billion* in costs on the American people *annually*, but will create only $4-6 *million* in annual benefit in reduced [hazardous air pollutant] emissions"); 14-46 Pet. 12 (making same assertion); 14-47 Pet. 3 (same).

Petitioners' statements reflect a serious misunderstanding of the EPA's cost-benefit analysis. As the EPA explained in promulgating the 2012 Final Rule, the agency actually concluded that the rule will yield overall annual monetized benefits of between $37 billion and $90 billion (measured in 2007 dollars), while generating annual costs of $9.6 billion. 77 Fed. Reg. at 9305-9306. That analysis includes the EPA's estimate of the co-benefits associated with reducing emissions of particulate matter and sulfur dioxide, along with a partial estimate of the direct benefits associated with reducing emissions of hazardous air pollutants listed under Section 7412(b). *Ibid.*

The EPA has also stated that it is impossible to quantify the full benefits directly associated with the rule's reduction of Section 7412(b) pollutants. See

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severity of health effects. See, *e.g.*, 2011 Proposed Rule, 76 Fed. Reg. at 24,992 (considering "the nature and severity of the health effects associated with exposure," the agency's "degree of confidence in [its] knowledge of these health effects," and "the magnitude and breadth of the exposures and risks posed by [hazardous air pollutant] emissions"); see also Pet. App. 40a-42a (rejecting petitioners' challenge to the EPA's application of those factors).

2012 Final Rule, 77 Fed. Reg. at 9306, 9323, 9426-9432. Although the EPA estimated that the rule would yield $4 million to $6 million in such benefits as a result of certain specific reductions in IQ loss, the agency explained that "these calculated benefits [from reductions in IQ loss] are a *small subset* of the benefits of reducing [mercury] emissions" under the 2012 Final Rule. *Id.* at 9428 (emphasis added). The EPA also stated that, despite the "limitations and uncertainties" associated with the calculations, "it remains clear that *the benefits of this rule * * * are substantial and far outweigh the costs.*" *Id.* at 9306 (emphasis added). Petitioners' arguments conflate the EPA's estimate of one small component of the direct benefits associated with the rule with the agency's assessment of the rule's (much larger) *total* benefits.

When properly understood, the EPA's cost-benefit analysis directly undermines petitioners' case for further review. Although the EPA did not rely on that analysis when it made the finding that petitioners challenge, the analysis reflects the agency's considered judgment that the overall benefits of subjecting power plants to regulation under Section 7412 far outweigh the overall costs—to the tune of many tens of billions of dollars. Thus, even if the EPA were required to consider costs in making its "appropriate and necessary" determination, as petitioners argue, there is no reason to expect that it would reach a different conclusion and decline to regulate power plants. In these circumstances—where even a decision favorable to petitioners is unlikely to make any practical difference—this Court's intervention is especially unwarranted.

2. Petitioners also criticize the EPA's decision to regulate power-plant acid gas emissions (such as hydrogen chloride and hydrogen fluoride). 14-49 Pet. 22-28; see also 14-47 Pet. 19, 24-27. They argue that (1) the EPA erred in concluding that, once it decided to regulate power-plant emissions under Section 7412(n)(1)(A), it was required to regulate all hazardous air pollutants; and (2) the EPA lacked sufficient evidence to conclude that such emissions pose any threat to public health or the environment. 14-49 Pet. 22-28 (advancing both arguments); see also 14-47 Pet. 19, 24-27 (advancing first argument). The court of appeals correctly (and unanimously) rejected both of those contentions. Pet. App. 38a-44a.

a. After the EPA initially determined that power plants must be listed as a source category pursuant to Section 7412(c), the agency reasonably interpreted Section 7412(n)(1)(A) to require the promulgation of emission standards for all listed hazardous air pollutants, including acid gases, that power plants emit. See 77 Fed. Reg. at 9326; Pet. App. 38a-40a. As the court of appeals recognized, Section 7412(n)(1)(A) governs only the EPA's initial determination whether to list power plants as a source category to be regulated. Pet. App. 39a. Once listed, however, such facilities are properly treated like other listed source categories and therefore are subject to all of the requirements of Section 7412. *Ibid.* Petitioners do not challenge the court of appeals' unanimous conclusion that "EPA's 'appropriate and necessary' determination in 2000, and its reaffirmation of that determination in 2012, are amply supported by EPA's findings regarding the health effects of mercury exposure." *Id.* at 40a-41a.

Petitioners in No. 14-49 argue (Pet. 27) that "regulation under Section 7412(n)(1)(A) is pollutant-specific." They suggest (*ibid.*) that the EPA was obligated to make dozens of separate "appropriate and necessary" findings corresponding to each of the listed hazardous air pollutants that power plants emit. The statutory text does not support that proposition. Section 7412(n)(1)(A) directs the EPA to "regulate electric utility steam generating units [*i.e.*, the statutorily-defined source category of power plants] under this section, if [the agency] finds such regulation is appropriate and necessary." 42 U.S.C. 7412(n)(1)(A). Under the plain terms of the statute, the required determination concerns whether regulation of a particular *source category* "is appropriate and necessary," not whether regulation of particular types of emissions satisfies that standard. See Pet. App. 39a.

It is also significant that, if the EPA finds regulation of power plants to be "appropriate and necessary," Section 7412(n)(1)(A) directs the agency to regulate power plants "under this section"—*i.e.*, under Section 7412. Section 7412(d) sets forth the procedures for setting emission standards under Section 7412. It unambiguously requires the EPA to promulgate such standards for each listed hazardous pollutant emitted by sources within any listed category that includes major sources. See generally *National Lime Ass'n* v. *EPA*, 233 F.3d 625, 633-634 (D.C. Cir. 2000). Once the EPA decided to list power plants as a source category of hazardous air pollutants under Section 7412(c), Section 7412(d) required the agency to regulate power-plant emissions of all such pollu-

tants, including acid gases. See generally 77 Fed. Reg. at 9330.

b. Even if a pollutant-by-pollutant approach were required as petitioners assert, the EPA's decision to regulate acid gas emissions was justified by its findings concerning their harmful environmental effects. See 76 Fed. Reg. at 25,013, 25,016. Petitioners in No. 14-49 challenge (Pet. 22-25) the agency's factual findings concerning the dangers of acid gas emissions. That challenge, however, is outside the scope of its question presented in their petition, which asks only whether the EPA may decline to consider costs when making the Section 7412(n)(1)(A) "appropriate and necessary" determination. See 14-49 Pet. i.

In any event, the EPA's findings concerning the adverse environmental impacts of acid gas emissions are amply supported by the record. See 76 Fed. Reg. at 25,013, 25,016. Published scientific research demonstrates that power-plant acid gas emissions can exacerbate acidification effects already being experienced in sensitive ecosystems. *Id.* at 25,013 & n.127. In issuing the 2011 Proposed Rule, the EPA noted that it "remains concerned about the potential for acid gas emissions to add to already high atmospheric levels of other chronic respiratory toxicants and to environmental loading and degradation due to acidification." *Id.* at 25,016. The agency concluded that it was "appropriate" to regulate acid gases because they "are known to contribute to chronic non-cancer toxicity and environmental degradation." *Ibid.* As the court of appeals correctly explained, the EPA had no obligation to quantify the precise contribution of power-plant acid gas emissions to ecosystem acidification before finding an environmental hazard. See Pet.

App. 41a (holding that the "EPA is not obligated to conclusively resolve every scientific uncertainty before it issues regulation").

Petitioners in No. 14-49 disagree (Pet. 23-25) with the EPA's assessment of the harms posed by acid gases, and they assert that the agency should have separately analyzed the role of power-plant emissions of acid gases in causing those effects. But there is no reason for this Court to second-guess the EPA's expert judgment on this narrow, factbound issue. The EPA's discussion of acid gases pointedly noted, moreover, that power plants "emit over half of the nationwide emissions of HCl and HF," which are two of the most significant acid gases. 76 Fed. Reg. at 25,016. The EPA therefore had good reason to believe that reducing such power-plant emissions would mitigate the harms caused by acid gases generally.[13]

3. As explained above, the court of appeals correctly upheld the EPA's interpretation of Section 7412, as

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[13] Petitioners in No. 14-47 also suggest (Pet. 24-25) that EPA should not have regulated acid gas emissions under Section 7412 because any environmental harms posed by such gases are adequately addressed by Title IV of the Clean Air Act Amendments of 1990, 104 Stat. 2584, which directly regulates certain pollutants responsible for acid rain. The court of appeals correctly concluded that petitioners had forfeited that argument by failing to raise it before the EPA or in their opening brief in that court. Pet. App. 47a. In any event, petitioners ignore the facts that (1) neither hydrogen chloride nor hydrogen fluoride is regulated under the Title IV trading program; (2) many sensitive ecosystems across the country are still experiencing harmful acidification notwithstanding Title IV, see 2011 Proposed Rule, 76 Fed. Reg. at 25,016; and (3) power plants are still responsible for the vast majority of anthropogenic hydrogen chloride and hydrogen fluoride emissions in the United States, even after implementation of the Title IV acid rain program, *id.* at 25,005.

well as the agency's conclusion that it is "appropriate and necessary" to regulate power plants. The court based its ruling on a straightforward, routine, and case-specific application of *Chevron* principles. The court's decision upholding the EPA's interpretation of Section 7412(n)(1)(A) is both correct and unlikely to have broader legal implications.

Petitioners offer no plausible basis for concluding that the practical impact of the regulation, standing alone, is so extreme as to provide a sufficient justification for this Court's review. Nor do they contend that the court of appeals' decision misapplied established administrative law principles or will affect the outcome of any future case. Further review is not warranted.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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